

# The Oath Doesn't Require Originalist Judges

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## INTRODUCTION

Judges take oaths to uphold the Constitution. Little do they know, this ritual commits all of them to originalism—or so several scholars have recently argued.<sup>1</sup> And it's not just a small group of vocal originalists who believe this. The idea that pledging allegiance to a constitutional document somehow entails originalism has gained a foothold in Utah.<sup>2</sup> Here is Associate Justice Thomas Rex Lee, writing for its Supreme Court:

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<sup>1</sup> See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2394 (2015); Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497 (2018); Christopher R. Green, "This Constitution": *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009) [hereinafter Green, *Constitutional Indexicals*]; Christopher R. Green, *Does the Oath of Office Bind Constitutional Interpretation?*, NEWSWEEK (May 21, 2020, 12:16 PM), <https://www.newsweek.com/does-oath-office-bind-constitutional-interpretation-opinion-1505760> [https://perma.cc/SXJ7-VAUN]; Christopher R. Green, *Is the Oath Argument for Originalism Circular?*, THE ORIGINALISM BLOG (May 11, 2020, 9:48 PM), <https://originalismblog.typepad.com/the-originalism-blog/2020/05/is-the-oath-argument-for-originalism-circular.html> [https://perma.cc/MBM6-W978] [hereinafter Green, *Circular*]; Josh Hammer, *Common Good Originalism*, THE AM. MIND (May 6, 2020), <https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism/> [https://perma.cc/BVR3-MHWW]; Michael Stokes Paulsen, *Originalism: A Logical Necessity*, NAT'L REV. (Sept. 13, 2018, 11:20 AM), <https://www.nationalreview.com/magazine/2018/10/01/originalism-a-logical-necessity/> [https://perma.cc/8EB8-L4NQ].

<sup>2</sup> See *Mitchell v. Roberts*, 469 P.3d 901, 904 (Utah 2020).

We are asked . . . to interpret and apply the terms of the Utah Constitution . . . We take a solemn oath to uphold that document—as ratified by the people who established it as the charter for our government, and as they understood it at the time of its framing. That understanding is controlling.

The original meaning of the constitution binds us as a matter of the rule of law. Its restraint on our power cannot depend on whether we agree with its current application on policy grounds. Such a commitment to originalism would be no commitment at all. It would be a smokescreen for the outcomes that we prefer.<sup>3</sup>

This is an unfortunate development. Nothing about oaths to support constitutions necessarily requires judges to be originalists.<sup>4</sup> Although others have criticized attempts to establish originalism on the thin basis of constitutional oaths,<sup>5</sup> we emphasize—uniquely, we believe—that oath-based arguments fail for reasons that proponents of these arguments already accept. Specifically, we argue that careful attention to the content of Constitutional oaths shows why judges have discretion to adopt nonoriginalist approaches to adjudicating constitutional disputes. More specifically still, judges are bound to discharge their responsibilities to the best of their abilities and understanding.<sup>6</sup> Because this proviso allows judges to be nonoriginalists—as indeed most judges over the course of our history have been—the oath cannot plausibly be regarded as requiring judges to be originalist in any interesting sense. We argue that, ironically, oath-based originalists don't take Constitutional oaths seriously enough.

But first we need to get clear on some terminology. After all, any discussion of “originalism” risks equivocation. The term is slippery. Originalists disagree among themselves. Some purportedly “originalist” claims seem trivial.<sup>7</sup> It is trivial, for example, that judges assessing constitutional cases should take seriously the original text of the Constitution. Nonoriginalists hold this view as well, so it certainly isn't what makes an approach originalist.

<sup>3</sup> *Id.*

<sup>4</sup> Here is Utah's oath in full: “I do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States and the Constitution of the State of Utah, and that I will discharge the duties of my office with fidelity.” UTAH CONST. art. IV, § 10. This oath says nothing about originalism or original public meaning.

<sup>5</sup> See Charles Barzun, *The Oath Argument*, BALKINIZATION (May 19, 2020), <https://balkin.blogspot.com/2020/05/the-oath-argument.html> [<https://perma.cc/TC5Y-5A67>]; Cass R. Sunstein, *The Debate over Constitutional Originalism Just Got Ugly*, BLOOMBERG (May 15, 2020), <https://www.bloomberg.com/opinion/articles/2020-05-15/is-the-constitution-a-living-document-supreme-court-can-decide> [<https://perma.cc/32UZ-MCCC>]; Adrian Vermeule, *On “Common-Good Originalism,”* MIRROR OF JUSTICE BLOG (May 9, 2020), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2020/05/common-good-originalism.html> [<https://perma.cc/8H78-YU5T>].

<sup>6</sup> This “best of my abilities and understanding” language was part of the judicial oath for over 200 years, but then was removed. Nevertheless, the oath as amended continues to communicate the same idea. See *infra* notes 36–38 and accompanying text.

<sup>7</sup> See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 10–12, 22 (2009).

With this warning in mind, there are at least two types of originalism that have been pressed by those pursuing oath-based arguments: First, there is what Professor Randy Barnett calls “Fearless Originalism”; and, second, there is “Ontological Originalism.”<sup>8</sup> We understand Fearless Originalism to accept the following claims: (a) the Constitution is a set of propositions expressed by the Constitutional text, propositions which were fixed in time when a given textual provision was adopted—i.e., the Constitution is a set of original meanings,<sup>9</sup> (b) officials are “bound to” or constrained by those meanings,<sup>10</sup> and (c) more specifically, if some official conduct—including an act of legislation—conflicts with that set of original meanings, then courts must invalidate it as unconstitutional when that conduct is challenged as such.<sup>11</sup>

As we will see, Fearless Originalists make strong claims about how judges should do their jobs and are no fans of doctrines of judicial deference. But other originalists, Ontological Originalists, commit to less.<sup>12</sup> They argue that Constitutional oaths tell us something important about what the Constitution *is* (hence the label, “Ontological”). And, they maintain, it is widely accepted by oath-taking officials that their oaths are the same—indeed, that the content of those oaths is identical to the content of the constitutional

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<sup>8</sup> Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) [hereinafter Barnett, *It's a Bird, It's a Plane*].

<sup>9</sup> See Green, *Constitutional Indexicals*, *supra* note 1, at 1607; Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1249 (2019) [hereinafter Solum, *Conceptual Structure*]; Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) [hereinafter Solum, *The Fixation Thesis*]. As Solum observes, original public meaning has seemingly become the consensus winner on what the originalist object should be. See Solum, *The Fixation Thesis*, *supra*, at 27. But we use “original meaning” to elide more fine-grained distinctions that won't make a difference for our purposes, such as the distinction between original public meaning, original intended meaning, and original legal meanings.

<sup>10</sup> See *Mitchell v. Roberts*, 469 P.3d 901, 904 (Utah 2020); Evan D. Bernick & Christopher D. Green, *What is the Object of the Constitutional Oath* 43 (Sept. 1, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3441234](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441234) [<https://perma.cc/4UV3-VP73>]; Green, *Circular*, *supra* note 1.

<sup>11</sup> See Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2065 (2006); see also Solum, *Conceptual Structure*, *supra* note 8, at 1243, 1249, 1261 (describing the “constraint principle” and suggesting a distinction between originalist theories and judicial theories of strong deference, such as Thayerism).

<sup>12</sup> The distinction between Fearless Originalism and Ontological Originalism here is very similar to the distinction identified by Mitchell Berman between prescriptive originalism and constitutive originalism. See Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1337–44 (2018). We use the terms “Fearless” and “Ontological” because they do not necessarily refer to the same things. “Ontological” originalism, according to our interlocutors, is a theory that explains what *object* is picked out by “this Constitution” in the Constitutional text, whereas constitutive originalism concerns these about what makes it the case that certain propositions of constitutional law are true. See *id.* at 1337. It is not logically incoherent to maintain that “this Constitution” refers to the set of propositions expressed by the constitutional text as a matter of, say, original public meaning, but then deny that the set is constitutive of true propositions of constitutional law. As for what we call “Fearless Originalism,” it is a subset of what Berman calls “prescriptive” theories of originalism. For these reasons, we keep the similar labels apart.

oath taken by George Washington: a commitment to support “the Constitution.”<sup>13</sup> But “the Constitution” as the founding generation understood it could only refer, as (a) stipulates, to the set of meanings that the Constitutional text expressed to the founding generation—i.e., “the Constitution” *just is* a set of original meanings expressed by the Constitutional text.<sup>14</sup> And because officials take the “same” *oath* as all other officials, it follows that they must all undertake obligations to be constrained by those original meanings (as (b) stipulates). But Ontological Originalists don’t necessarily endorse (c), given that originalists differ on what it means to give legal effect to the Constitution’s original meanings, with some (for example) permitting adherence to nonoriginalist precedent. In short, Ontological Originalists accept (a) and (b) but remain silent about (c). So, Ontological Originalism is supposed to be both more limited and more fundamental than its Fearless cousin.

Regardless of whether originalism is understood in “fearless” or more basic ontological terms, taking an oath to uphold the Constitution does not require judges to be originalists. And the oath itself shows why.

### I. THE OATH DOESN’T REQUIRE “FEARLESS” ORIGINALISM

In our view, “originalism” worth the name provides robust guidance to or constrains judges in some meaningful way, even though originalists may differ on how judges should define and implement those constraints.<sup>15</sup> After all, “originalism” is supposed to be an appealing doctrine because it provides a principled and superior alternative to, say, common law constitutional adjudication or living constitutionalism, which originalists deride as unmoored from the Constitutional text itself. Originalism worth the name is supposed to provide a strongly constraining method that imposes limits on judges otherwise inclined to impose their own policy preferences on the polity in the guise of interpretation.<sup>16</sup> Or as Nelson Lund writes, “The core of originalism is the proposition that text and history impose meaningful, binding constraints on interpretive discretion.”<sup>17</sup>

With those remarks in mind, our first target is the view that the judicial oath to uphold “this Constitution” necessarily, with a few other premises, requires judges to adopt a very strong form of originalist judging. Again, call

<sup>13</sup> See Bernick & Green, *supra* note 9, at 13–17; Green, *Circular*, *supra* note 1.

<sup>14</sup> See Green, *Constitutional Indexicals*, *supra* note 1, at 1643.

<sup>15</sup> See generally Solum, *Conceptual Structure*, *supra* note 8; Lawrence B. Solum, Semantic Originalism (Nov. 25, 2008) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) [<https://perma.cc/BYS7-57XM>]. For a discussion of the sense in which originalist methodologies may count as “constraining,” see generally William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017).

<sup>16</sup> See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) (“Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its *raison d’être*.”).

<sup>17</sup> Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1372 (2009).

this robust view of originalism Fearless Originalism.<sup>18</sup> As noted above, the view accepts the following claims: (a) the Constitution is a set of propositions expressed by the Constitutional text, propositions which were fixed in time when a given textual provision was adopted—i.e., the Constitution is a set of original meanings,<sup>19</sup> (b) officials are in some sense “bound to” or committed to give legal effect to those meanings,<sup>20</sup> (c) more specifically, if some official conduct—including an act of legislation—conflicts with that set of original meanings, then courts *must* invalidate it as unconstitutional when that conduct is challenged as such.<sup>21</sup>

Michael Stokes Paulsen endorses this very strong version of originalism.<sup>22</sup> He thinks it somehow follows from the fact that judges take an oath to uphold “this Constitution.”<sup>23</sup> He writes, “the Constitution itself (in Article VI’s specification of ‘[t]his Constitution’ as the supreme law of the land . . . and the nature of written constitutionalism generally), requires a methodology of original, objective-public-meaning textualism.”<sup>24</sup> As a corollary, he asserts that swearing an oath to uphold “this Constitution” requires adhering to its original public meaning and eschewing any competing interpretive methodology.<sup>25</sup> While acknowledging that forcing officials to abide by ancient constitutional strictures presents a “dead hands” problem, the oath, claims Paulsen, solves that problem too: by pledging to uphold “this Constitution.”<sup>26</sup> He writes:

To willfully depart from the document one is sworn to uphold is, indeed, revolution by judiciary, an overthrowing of the ancien régime. . . . When a prior interpretation of the Constitution, by any branch of government, including the courts, has departed from the meaning of the Constitution, one must always prefer—if one is truly interpreting and applying the Constitution—the objective,

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<sup>18</sup> Barnett, *It's a Bird, It's a Plane*, *supra* note 8, at 1233 (contrasting “faint-hearted” originalism with “fearless” originalists like “Mike Paulsen, Gary Lawson, and [Barnett himself] who reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices”).

<sup>19</sup> See Green, *Constitutional Indexicals*, *supra* note 1, at 1624; Solum, *Conceptual Structure*, *supra* note 8, at 1249; Solum, *The Fixation Thesis*, *supra* note 8, at 1. As Solum observes, original public meaning has seemingly become the consensus winner on what the originalist object should be. See Solum, *The Fixation Thesis*, *supra* note 8, at 27. But we use “original meaning” to elide more fine-grained distinctions that won’t make a difference for our purposes, such as the distinction among original public meaning, original intended meaning, and original legal meanings.

<sup>20</sup> See generally Bernick & Green, *supra* note 9; Green, *Circular*, *supra* note 1.

<sup>21</sup> See Paulsen, *supra* note 10, at 2065; Solum, *Conceptual Structure*, *supra* note 8, at 1249 (describing the “constraint principle”); *id.* at 1261 (suggesting a distinction between originalist theories and judicial theories of strong deference, such as Thayerism).

<sup>22</sup> See Paulsen, *supra* note 10, at 2063–65.

<sup>23</sup> *Id.*

<sup>24</sup> Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2741 n.96 (2003) (citation omitted).

<sup>25</sup> See *id.*

<sup>26</sup> See Paulsen, *supra* note 10, at 2063.

original linguistic meaning of the Constitution's words and phrases to past departures from that meaning . . . . A principled originalist must reject strong theories of *stare decisis*.<sup>27</sup>

Let's set aside the question of whether the oath genuinely solves the dead hands problem (hint: it doesn't).<sup>28</sup> Notice instead that, according to Paulsen, the oath to uphold "this Constitution" entails a requirement that judges be original-public-meaning originalists. And, what's more, this further requires that judges decline to abide by precedent that is not justifiable on originalist grounds, including nonoriginalist precedent.

Paulsen is a Fearless Originalist, since he plainly accepts criteria (a) through (c). He accepts that the Constitution *is* the linguistic meanings expressed by the Constitutional text (as in (a)). But he not only believes that those meanings should be given *some* legal effect (as in (b)). After all, some faint-hearted originalists hold that, in effect, original meanings should be afforded *defeasible* legal status that nonoriginalist precedent may sometimes override.<sup>29</sup> Instead, as in (c), Paulsen maintains that courts must afford the original meanings of the Constitutional text *decisive* weight against any other source of constitutional legal norms, including conflicting nonoriginalist precedent. This leads Paulsen to reject any version of originalism that embraces *stare decisis* when it calls for adhering to precedent that conflicts with the original meaning of the Constitutional text.

Paulsen is not alone in regarding principled originalism to be incompatible with a strong view of *stare decisis*. So-called "fearless originalists"—including Randy Barnett and Gary Lawson—agree that a strong commitment

<sup>27</sup> *Id.* at 2063–65 (emphasis omitted).

<sup>28</sup> In brief: the dead-hands problem has many formulations. One (very rough) version focuses on how a plainly immorally restricted group of constitutional decision makers—only white male property owners of a certain kind that excluded women and slaves from decision-making—could legitimately bind a polity to a structure of government, and set of substantive rights, more than two hundred years later. See, e.g., Eric J. Segall, *Burying the Dead Hand: Taking the Original Out of Originalism*, AM. CONST. SOC'Y (Oct. 24, 2019), <https://www.acslaw.org/expertforum/burying-the-dead-hand-taking-the-original-out-of-originalism> [<https://perma.cc/45XH-9KHG>]. Originalists may have an answer to the problem but the oath cannot be part of it. It is no answer to this problem that officials are currently promised to be bound, when the whole dead-hands question is whether making that promise should be regarded as legitimate or binding, and if so, to what extent. Richard Re argues that the oath to uphold the Constitution commits the oath's taker to uphold contemporaneous understanding of it, which needn't be an originalist one. See Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. REV. 299, 299 (2016). This approach—although problematic in its own right—appears to mitigate the problem somewhat, since committing to more recent understandings of Constitutional practice does not necessarily face quite the legitimacy concerns faced by founding-era decisions.

<sup>29</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862, 864 (1989) (observing that "most originalists are fainthearted," while acknowledging that "in a crunch" he would act as a fainthearted originalist). Years later Scalia disavowed fainthearted originalism—at least with respect to the constitutional permissibility of flogging. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 4, 2013, <https://nymag.com/news/features/antonin-scalia-2013-10/>. It is unclear whether he his ostensive repudiation of fainthearted originalism made its way into his opinions.

to *stare decisis* is incompatible with originalism.<sup>30</sup> And in his recent concurrence in *Gamble v. United States*,<sup>31</sup> Justice Clarence Thomas set forth his “simple” rule of precedent, drawn from Caleb Nelson’s work: “When faced with a demonstrably erroneous precedent, . . . We should not follow it. This view of *stare decisis* follows directly from the Constitution’s supremacy over other sources of law—including our own precedents.”<sup>32</sup> Justice Thomas’s proposed rule is plainly incompatible with a strong commitment to *stare decisis*.<sup>33</sup> Where Paulsen apparently differs is in *justifying* his fearless originalism on the basis that judges take an oath to protect the Constitution.

But that justification doesn’t follow from the oath. Here is the actual oath taken by judges under the Judiciary Act of 1789:

I, \_\_\_\_\_, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that *I will faithfully and impartially discharge and perform all the duties incumbent upon me* as \_\_\_\_\_, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.<sup>34</sup>

This best-of-my-abilities language appeared explicitly in oaths taken by federal judges for 200 years, from 1789 to 1990. Under the Judicial Improvement Act of 1990, this best-of-abilities language was stricken.<sup>35</sup> But the language expressing the fundamental obligation—i.e., “to faithfully and impartially discharge and perform all the duties incumbent upon me as

<sup>30</sup> See, e.g., Barnett, *It’s a Bird, It’s a Plane*, *supra* note 8, at 1233 (contrasting “faint-hearted” originalism with “fearless” originalists like “Mike Paulsen, Gary Lawson, and [Barnett himself] who reject the doctrine of *stare decisis* in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices.”); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24, 27–28 (1994); Paulsen, *supra* note 10, at 2063–65.

<sup>31</sup> 139 S.Ct. 1960 (2019).

<sup>32</sup> *Id.* (Thomas, J., concurring); see generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

<sup>33</sup> For an originalist rejoinder to Justice Thomas, see John O. McGinnis, *Why Justice Thomas Is Wrong About Precedent*, L. & LIBERTY (July 25, 2019), <https://lawliberty.org/why-justice-thomas-is-wrong-about-precedent/> [<https://perma.cc/BHU4-RW5M>]. McGinnis contests Justice Thomas’s reading of history, though it’s less obvious whether he is fully responsive to Justice Thomas’s core jurisprudential claim, which is that the constitutional text’s original meaning should prevail when in conflict with other subordinate sources of law. Regardless, even McGinnis—who defends the in-principle compatibility of *stare decisis* with originalism—appears to reject a *strong* commitment to *stare decisis*; that is, he denies that a doctrine of constitutional precedent should look like “the strong form of precedent that English courts applied to the statutory decisions,” while adding, “precedent rules should indeed be less protective of wrong constitutional decisions than they have become in the modern era.” *Id.* So we might count McGinnis among those originalists who would accept (c).

<sup>34</sup> Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (emphasis added) (codified as amended at 28 U.S.C. § 453 (2018)).

<sup>35</sup> See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 404, 104 Stat. 5089, 5124 (codified at 28 U.S.C. § 453 (2018)).

\_\_\_\_\_ under the Constitution and laws of the United States”—remains the same.<sup>36</sup>

In Part II, we deploy this language against the argument that the judicial oath requires judges to embrace Ontological Originalism. For now, notice first and most obviously that nothing in the text says anything about the strength or weakness of a particular judge’s conception of *stare decisis* or about interpretive methodology more generally. Nor do “the Constitution and laws of the United States.”<sup>37</sup> The Constitutional text says remarkably little about how judges should do their jobs.<sup>38</sup> The only way that the judicial oath requires judges to commit to Fearless Originalism—whether in the present or prior versions—is by somehow presupposing that the only way that a federal judge can faithfully and impartially discharge her duties as a judge is as a fearless originalist.

But that begs the question. We cannot simply assume that the only way one can faithfully discharge one’s judicial obligations is by rejecting a strong form of *stare decisis*. That position must be argued for. Indeed, Fearless Originalists have done precisely this.<sup>39</sup> But their arguments are independent of the oath.<sup>40</sup> The basic idea they pursue is as simple as it is elegant: because the original meaning of the Constitutional text sets forth the supreme law and overrides any conflicting decisions by officials, any judicial precedent that conflicts with original meaning must yield to that meaning, notwithstanding *stare decisis*.<sup>41</sup> But notice that the oath performs no independent work in this argument. Oath-based arguments are entirely parasitic on the more basic one. In terms of the three criteria that define Fearless Originalism, this shows that the oath fails to establish thesis (c): that judges are duty-bound to invalidate official acts that contravene original meaning.

Paulsen might insist that our objection misses the point. Surely the oath adds a decisive *moral* reason to be a Fearless Originalist. Put differently, the oath raises the stakes by showing that any judge that fails to give full legal effect to original meaning in the face of contrary precedent necessarily commits a moral wrong by failing to comply with the oath that she has taken.

But this argument yields absurdity. It entails that many judges, indeed, probably all of them, have either violated their oaths of office or are expressly willing to do so. According to the Fearless Originalist, nonoriginalist judges not only make mistakes of law when they, for example, commit to a strong version of *stare decisis*, or when they otherwise fail to treat original meaning as dispositive. Doing these things—according to the Fearless Originalist—also violates their oaths of office. Nor are all originalists spared from the

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Indeed, it famously—or infamously—fails to mention any power of judicial review of legislation. See generally Stephen R. Alton, *From Marbury v. Madison to Bush v. Gore: 200 Years of Judicial Review in the United States*, 8 TEX. WESLEYAN L. REV. 7, 17 (2001) (“As we know, the United States Constitution is silent on the power of judicial review.”).

<sup>39</sup> See, e.g., Barnett, *It’s a Bird, It’s a Plane*, *supra* note 28, at 1233.

<sup>40</sup> See *id.*

<sup>41</sup> See *supra* note 26.

harsh judgment of Paulsen's Fearless Originalism. After all, nonoriginalists are not the only ones who willingly set aside original meaning in the face of precedent. Faint-hearted originalists like Justice Scalia explicitly made exceptions for pragmatic considerations.<sup>42</sup> Fearless Originalists would be forced to conclude that even Justice Scalia's willingness to set aside original meaning for pragmatic reasons would violate his oath of office.<sup>43</sup> But the problem is even worse. The oath of office is not limited to requiring judges to faithfully and impartially administer the Constitutional text; the oath also requires faithfully and impartially administering all laws. But by the reasoning of the Fearless Originalist, this "faithful and impartial" discharging of judicial duties means that any mistake of law made by a judge would count as a violation of that judge's oath, not merely a cause for reversal on appeal. And because all judges that have ever served on the federal bench have either been nonoriginalists, or faint-hearted about it, or have made a mistake of law, the Fearless Originalist position would entail that virtually all Judges and Justices have violated their oaths of office.

This implication is absurd. It strains credulity to imagine that virtually all judges have *violated their oaths*, even if we think that virtually all judges fall short of our high expectations. This means that there's a flawed assumption in the argument. Indeed, it mistakenly assumes that judges who make mistakes of law—including, for the sake of argument, originalists or nonoriginalists who embrace strong versions of *stare decisis*—thereby simultaneously violate their oaths of office. This is implausible. More plausible is that oaths involve an official's voluntarily undertaking an obligation to discharge her responsibilities in good faith. This is a far cry from the obligation to always get the right answer or to never make a mistake, whether regarding interpretive methodology or a more run-of-the-mill legal mistake. After all, it is a much more serious charge to claim that a judge has violated her constitutional oath than to claim that she made a mistake of law. Lower courts make the latter type of mistake all the time; that's why we have courts of appeal. To err is human. But it would be intuitively far more troubling if judges systematically failed to discharge their duties in good faith.

Sensitive to this concern, one might reply that systematic oath violations might be excusable, and certainly not the kind of mistake that would warrant "mass impeachments" of judges.<sup>44</sup> But this response misses the

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<sup>42</sup> See Scalia, *Originalism: The Lesser Evil*, *supra* note 29, at 864.

<sup>43</sup> Some have argued that Scalia's exceptions to originalism prove that he is not, truly, an originalist. See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006); ERIC SEGALL, ORIGINALISM AS FAITH 122–40 (2018). But this is still a far cry from arguing that Justice Scalia violated his oath of office. For a partial defense of Scalia's originalism, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017) but see RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS 54–55 (2018) (discussing Justice Scalia's purported embrace of fearless originalism, while noting doubts about whether he put his change of heart into practice).

<sup>44</sup> Bernick & Green, *supra* note 10, at 42. Bernick and Green offer this in response to a similar worry voiced by Cass Sunstein. Cass Sunstein, *The Debate Over Constitutionalism Just Got Ugly*, BLOOMBERG OPINION, May 16, 2020, <https://www.bloombergquint.com/gadfly/is-the-constitution-a-living-document-supreme-court-can-decide>.

point. The point is that understanding the oath of office to *require* upholding a constitutional methodology that *no judge has actually adhered to* renders implausible that understanding of the oath, especially given that other understandings do not yield that absurdity. That is, as between an understanding that implies that every virtually judge has violated his or her oath of office and a fair understanding that does not imply that result, we should choose the latter. And a fairer understanding is available. As Thomas Grey remarks, for example, “The oath is a ritual of allegiance, requiring officers to affirm their primary loyalty to the Union that the Constitution represents.”<sup>45</sup> Grey’s understanding—or others like it that construe the oath of office as primarily an oath of allegiance—explains why it is so serious to allege that officials have violated their oaths: it is a wrongdoing on par with betraying one’s country.<sup>46</sup> Choosing the “wrong” version of originalism—or declining to be an originalist altogether—can be criticized on many grounds. An act of betrayal it is not.

To summarize, the oath of office does not require judges to be Fearless Originalists. The oath plays no independent role in determining whether this is so. Nor does it provide an additional moral obligation to be a Fearless Originalist. Fearless Originalism might be correct. But the oath is entirely beside the point.

## II. THE OATH DOESN’T REQUIRE ONTOLOGICAL ORIGINALISM

Not everyone who endorses oath-based arguments for originalism also accepts the full baggage of Fearless Originalism. We might wonder whether there is an oath-based argument that yields a much weaker, less committed form of originalism. Christopher Green, alone and in his co-authored work with Evan Bernick, tries.<sup>47</sup> He is concerned with “ontology” and not epistemology or judicial practice. The oath is supposed to tell us something about what “this Constitution” refers to as opposed to showing anything deep about how judges should do their jobs. And what the Constitution *is*, according to Green and Bernick, is a set of meanings fixed in time when a given constitutional provision was ratified.<sup>48</sup> They accept, in other words, (a) from above, without necessarily endorsing a particular methodology about how to go about unearthing or implementing those meanings, and hence,

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<sup>45</sup> Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984).

<sup>46</sup> See, e.g., Martin Pengelly & Richard Luscombe, ‘Complicit in big lie’: Republican Senators Hawley and Cruz Face Calls to Resign, THE GUARDIAN, Jan. 10, 2021, (“On Saturday, Sherrod Brown, a Democratic senator from Ohio, called for Cruz and Hawley’s ‘immediate resignations’ and said they had ‘betrayed their oaths of office and abetted a violent insurrection on our democracy’.”), <https://www.theguardian.com/us-news/2021/jan/10/capitol-attack-republican-senators-josh-hawley-ted-cruz-face-resign>.

<sup>47</sup> The argument spans two papers, one authored by Green alone and one work in progress co-authored with Bernick. See Green, *Constitutional Indexicals*, *supra* note 1, at 1618; see also Bernick & Green, *supra* note 9, at 39.

<sup>48</sup> Bernick & Green, *supra* note 9, at 4–5.

without necessarily taking a position on, say, how strong *stare decisis* should be. That is, they can *agree* that the oath doesn't entail Fearless Originalism while insisting that originalism is true. They are principally concerned to show that, whatever the Constitution *is*, that thing has not changed over time, except through a formal amendment process. And originalism best fits with this understanding of the Constitution as an unchanging "thing" (again, whatever that thing is).

It also seems clear that, despite their professed interest in what "the Constitution" refers to (i.e., claim (a)), they also embrace proposition (b), which holds that officials are bound, in virtue of their Constitutional oaths, to give legal effect to the original meaning of the Constitution.<sup>49</sup> Although we believe that the preceding argument in Part I refutes even (b),<sup>50</sup> we will not pursue that line of argument further. Instead, we will now consider Green and Bernick's view on its own terms, in Section A below, followed by a critique in Section B.

### A. *An Argument for Ontological Originalism*

Green's argument consists of two parts. The first is his joint work with Evan Bernick, in which they present statements by public officials that aim to establish that they believe that they all take the "same" constitutional oaths.<sup>51</sup> More specifically, they assert that these officials—including judges, legislators, and presidents—routinely claim that they all take "the same" oath to support or defend "the Constitution."<sup>52</sup> Some representative examples:

- Senator Joe Manchin: "We take the same oath. We swear on the Bible to the same Constitution—that we will uphold it."<sup>53</sup>
- Justice Antonin Scalia: "Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do . . . ."<sup>54</sup>
- Senator Martin Heinrich: "Throughout our history, the defense of our Nation has depended on the leadership of men whose names we now remember when we visit their memorials, names like Lincoln and Washington and Roosevelt. These men all swore the same oath that President Trump did when they assumed our Nation's most powerful office."<sup>55</sup>

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<sup>49</sup> See Green, *Circular*, *supra* note 1 (concluding that the constitutional text's original meaning "binds" oath takers).

<sup>50</sup> The only difference is that, in addition to fearless originalists, faint-hearted originalists might also escape the charge of having violated their oaths of office. But every other judge, including every judge (originalist or not) ever to have made a mistake of law, would still be guilty of violating the oath of office. This too is implausible for reasons already explained.

<sup>51</sup> See Bernick & Green, *supra* note 9, at 9–19.

<sup>52</sup> See *id.*

<sup>53</sup> 164 CONG. REC. S625 (daily ed. Feb. 6, 2018) (statement of Sen. Manchin).

<sup>54</sup> *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting).

<sup>55</sup> 166 CONG. REC. S791 (daily ed. Feb. 3, 2020) (statement of Sen. Heinrich).

Green and Bernick point out that many officials also claim to take the same oath as their long-dead predecessors and members of the founding generation, including George Washington.<sup>56</sup> And this sameness is supposed to matter. If judges' oaths are the same across the board and across time, then they have all sworn an oath to support and defend *the same thing* as the founding generation, too: that is, whatever the term "the Constitution," contained in their oaths, happens to refer to.

But clearly this is not enough to yield originalism. If "the Constitution" refers to a living thing with evolving rather than fixed meanings (apart from the formal amendment process), then that entails that even the late Justice Scalia had unwittingly pledged to defend a living rather than his preferred "dead" Constitution. And Green and Bernick admit as much; so far, the argument is compatible with "the Constitution" referring to a thing that changes beyond the formal amendment process—i.e., living constitutionalism.<sup>57</sup> We need to understand what "the Constitution" refers to, after all, and none of the politicians that Green and Bernick cite cast much light on the matter.

Of course, their joint paper is not quite so modest. It contains further suggestions that are supposed to nudge us towards Ontological Originalism. After all, if George Washington truly took the same oath as Donald J. Trump, and if both swore to support and defend the Constitution, then whatever contemporaneous understanding of the Constitution that Washington felt obligated to defend should also bind Trump, including the public meaning of the text and its amendment processes as understood by Washington's contemporaries. This observation shifts the burden, according to Bernick and Green, to nonoriginalists to show how Washington and his cohort could understand the Constitution to change outside the formal amendment process.<sup>58</sup> And they think it unlikely that persuasive evidence of that is forthcoming.

But ultimately Green, at least, wishes to press further than this burden-shifting argument. In the second part of the overall argument, Green relies on his earlier, solo work to fill the gap, work that emphasizes the importance of indexicals in the constitutional text.<sup>59</sup> And indexicals—words like "I," "my," and "that"—are words that refer to different things depending on the context in which a person utters them.<sup>60</sup> Green argues that the indexical phrase, "this Constitution," refers to the text of the Constitution itself, and in turn, its original meaning.<sup>61</sup> His argument is abductive; that is, he acknowledges that the phrase "this Constitution" may refer to several different things. But he argues, through a process of elimination, that only one refer-

<sup>56</sup> See Bernick & Green, *supra* note 9, at 14–17.

<sup>57</sup> See *id.* at 39, 41.

<sup>58</sup> See *id.* at 41.

<sup>59</sup> See Green, *Constitutional Indexicals*, *supra* note 1, at 1643.

<sup>60</sup> See David Braun, *Indexicals*, STAN. ENCYC. PHIL. (Jan. 16, 2015), <https://plato.stanford.edu/entries/indexicals/> [<https://perma.cc/8NZH-UC27>].

<sup>61</sup> See Green, *Constitutional Indexicals*, *supra* note 1, at 1643.

ent makes sense: that “this Constitution” refers to the set of authoritative provisions embodied in the Constitutional text.

With this missing piece, and glossing over the difference between “the Constitution” and “this Constitution,” Green combines both parts of the argument to yield the following, surprising conclusion: that officials are committed to be ontological originalists—they are, in other words, bound to the original meaning of the Constitution. Not only are officials *permitted* to embrace (a), i.e., that the Constitution is whatever the original meaning of the Constitutional text is, but in fact the oath shows that they are, (b), *duty-bound* to give that meaning legal effect on pain of acting as immoral oath breakers.

Suffice it to say these efforts are unconvincing.

### B. *Why the Argument Fails*

The preceding argument fails. Before explaining why, Section (1) will clear the ground by pressing certain basic methodological concerns with the Bernick–Green argument. Section (2) takes aim at their core argument that the oaths of office bolster Ontological Originalism. To preview: Their core argument is that oaths of office typically involve upholding the Constitution, and that officials take the same oath. The problem is that, strictly speaking, they do not take the same oaths—and this matters: it creates a dilemma according to which they must either abandon a key premise in their argument or concede that the oaths have subjective content that allows office holders to follow their consciences to some degree. This dilemma either means that the oath permits officials to reject Ontological Originalism or that their argument contains a false premise and is therefore inconclusive. Finally, although our main concern is to show that nothing about the Oath provides an independent reason for officials to be originalists, we raise some independent doubts about Christopher Green’s work, to the extent that it attempts to argue that Constitutional terms called “indexicals” show that the words “the Constitution” refer to the set of original meanings of the Constitutional text. We argue that his argument is incomplete at best.

#### 1. *Methodological Concerns About the Green–Bernick Project*

Before revisiting their arguments, we should mention some threshold methodological worries about the Bernick–Green project that will *not* be our main focus. Notice first that narrowing originalism seems odd for oath-based arguments. We have claimed that “originalism” worth the name is the originalism that tells us something significant about how judges are supposed to do their jobs. Originalist methodology is often “sold” that way: as promising a principled method of constitutional adjudication that constrains

judges.<sup>62</sup> But once we learn that Bernick and Green's originalism is compatible with a dizzying variety of highly deferential and self-effacing constitutional methodologies, their version of originalism seems a far cry from originalism worth caring about.<sup>63</sup> At the extreme, a judge could in principle be an Ontological Originalist but adopt and promote a bright-line practical rule that *no judges ought try to discover original meanings in any case of practical importance* because attempting to do so would likely be a fool's errand.<sup>64</sup>

The focus is also puzzling given the point of oaths. Oaths themselves concern *actions* that the oath taker commits to undertake. They are speech acts that aim primarily to change the normative situation by undertaking obligations. A survey of the *constitutional* oaths reveal that they usually address "support[ing] and defend[ing] the Constitution."<sup>65</sup> Constitutional oaths speak, at least superficially, in terms of behavior judges are obligated to take, and not so much what judges ought to believe or what oath takers presuppose about the Constitution.<sup>66</sup> But Bernick and Green studiously avoid talking in any concrete way about what swearing an oath to support the Constitution requires of judges specifically.<sup>67</sup> If, as they insist, the oath is so important, it would be helpful to know what specifically it requires, especially of judges, as opposed to vague gestures towards supporting the Constitution and being bound by it.

Still, maybe we can learn something interesting about what the Constitution is by studying the oath, without attending to the messy and multifarious ways that actual judges understand their constitutional oaths, or without engaging in any systematic sociological research on how constitutional oaths

<sup>62</sup> See Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 825 (1986) (defending originalism on the basis of its "capacity to control judges"); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L. J. 713, 714 (2011) ("Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its *raison d'être*."); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 2 (2009); Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 602 (2004).

<sup>63</sup> As already noted, Bernick and Green argue that the general form of their argument permits, given the appropriate contingent facts, even *living constitutionalism*. See Bernick & Green, *supra* note 9, at 41 ("The constitutional ontology presented here does not preclude living constitutionalism or other forms of nonoriginalism.").

<sup>64</sup> There is an analogy here well known in moral philosophy. Utilitarianism might be the correct theory of normative ethics, but utilitarianism itself might be committed to promoting non-utilitarian theories if doing so maximized the overall good. Cf. BERNARD WILLIAMS & JCC SMART, *UTILITARIANISM: FOR AND AGAINST* 134 (1973) ("[U]tilitarianism's fate is to usher itself from the scene.").

<sup>65</sup> Bernick & Green, *supra* note 9, at 7.

<sup>66</sup> We can put this another way. An oath, like a promise, is a performative that effectuates changes in normative states of affairs, including voluntarily undertaking certain commitments. But the contents of those commitments may come apart from the communicative contents of the utterances. If a couple vows to stay together "till death," this does not necessarily mean that they've flouted any moral or legal obligation if they subsequently get divorced. See Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 217, 233–34 (Andrei Marmor & Scott Soames eds., 2011).

<sup>67</sup> Again, see Bernick & Green, *supra* note 9, at 41 ("The constitutional ontology presented here does not preclude living constitutionalism or other forms of nonoriginalism.").

are actually understood as an objective matter by ordinary people. Perhaps by obligating themselves to take certain actions, judges *presuppose* that certain claims are true. But taking the further step of assuming that those claims are *actually* true seems strange. Making a promise or taking an oath does not guarantee any truths about reality. Suppose a father holds up an envelope while promising his young son to mail “this Letter to Santa Claus.” This promise presupposes that Santa exists and a letter exists. But Santa doesn't exist. Indeed, “this letter” may fail to refer to anything if, say, the envelope is empty, and even if the father and son sincerely believe that the envelope contains a letter. Conjuring truths about the world from linguistics is a tricky business.<sup>68</sup>

That said, we can agree that the phrases “this Constitution” and “the Constitution” refer to *something*. We are not constitutional nihilists. Even so, there are other good reasons to doubt that the oath requires any ontological commitments that are *distinctively* originalist. Before we proceed further, a quick clarification on this point. According to Ontological Originalism, the nature of the Constitution is fixed across time, and as a consequence, the meaning of the Constitution is likewise static. But nonoriginalists also hold that certain things about the Constitution, like the words printed in writing, are fixed. Likewise, the claim that the Constitution exists is not a distinctively originalist ontological claim. So, for originalist claims about the Constitution's ontology—i.e., claims about what a Constitution *is*—to be distinctive, those claims cannot also be shared by nonoriginalist views.

## 2. *The Main Objection*

Setting aside these threshold, methodological remarks, let's return to the arguments. Recall that Bernick and Green marshal evidence showing that officials of all stripes and ranks routinely claim to take the “same oath.”<sup>69</sup> But why should we take fashionable political rhetoric at face value? After all, strictly speaking, it is *false* that they all take the same oaths. Here is the text of the Presidential Oath from Article II:

I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.<sup>70</sup>

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<sup>68</sup> See Nicholas Laskowski, *How to Pull a Metaphysical Rabbit out of an End-Relational Semantic Hat*, 91 RES PHILOSOPHICA 589, 589 (2014) (criticizing an attempt to derive a naturalistic reduction of ethics by relying on a particular semantics for evaluative terms); Jonathan McKeown-Green, Glen Pettigrove & Aness Webster, *Conjuring Ethics from Words*, 49 NOÛS 71, 72–73 (2015) (criticizing a “sort of *direct* move from premises about the semantics of ‘good’, ‘right’, and ‘ought’ to conceptual or metaphysical conclusions about goodness, rightness, reasons, and obligations,” without denying that semantics might be useful as one piece of evidence for further metaphysical inquiry).

<sup>69</sup> Bernick & Green, *supra* note 9, at 9.

<sup>70</sup> U.S. CONST. art. II, § 1.

Here, the language of the oath differs markedly from the oath taken by judges from the Judiciary Act of 1789:

I, \_\_\_\_\_, do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.<sup>71</sup>

That oath, in turn, was modified by the Judicial Improvement Act of 1990, which deleted “according to the best of my abilities and understanding, agreeably to” and replaced that language with “under.”<sup>72</sup> So the *language* of the oaths appears to vary depending on which official is taking it, and when they took the oath (in the case of judges, before December 1990 or afterwards). And oaths also appear to vary across jurisdictions.

This much Bernick and Green acknowledge, as they must. Still, they insist that the *content* of constitutional oaths—the content of the obligations that oath takers undertake—does *not* differ notwithstanding the different language.<sup>73</sup> But they do not explain how these textually very different formulations produce identical content. For example, language of impartiality and doing “equal right to the poor and to the rich” are conspicuously absent in the case of the President’s oath.<sup>74</sup> And at least with respect to the President, the demands of impartiality appear, for obvious reasons, far less constrained. After all, having a presidential agenda requires a level of partiality in the form of policy preferences, some of which may prioritize the interests of the poor, the rich, or some other cohort. All of these par-for-the-course presidential preferences seem, at least if we take the judicial oath seriously, off limits for judges. So, it is simply implausible to assert that these differences in the oath are, as Green and Bernick insist, merely verbal. And so, it is a mistake to claim that the content of the oaths is the same no matter what.

But maybe this mistake is minor. More carefully put, they may insist on a more basic commitment shared by all officials, something to the effect that each official swears to support or defend or discharge one’s obligations under “the Constitution.” A common denominator of sorts. *Of course* supporting “the Constitution” will entail different things depending on the office at issue, they may acknowledge. And these role-based responsibilities perhaps explain the differences between the presidential and judicial oaths, for example, without denying that all oath takers support the Constitution. This re-

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<sup>71</sup> Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (codified as amended at 28 U.S.C. § 453 (2018)).

<sup>72</sup> 28 U.S.C. § 453 (2018); Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 404, 104 Stat. 5089, 5124 (“Section 453 of title 28, United States Code, is amended by striking out ‘according to the best of my abilities and understanding, agreeably to’ and inserting ‘under.’”).

<sup>73</sup> Bernick & Green, *supra* note 9, at 8.

<sup>74</sup> Richard M. Re, “*Equal Right to the Poor*,” 84 U. CHI. L. REV. 1149, 1149 (2017).

sponse preserves the way that very different officials may, despite having very different jobs, claim to take the “same” oath. But when it comes to the question of what judges *in particular* commit to by taking oaths, we cannot simply assume—as Bernick and Green evidently do—that the judicial oath’s full content is exhausted by a vague requirement to support the Constitution.

To see why, notice that for all of Green’s work about the significance of indexical terms,<sup>75</sup> and for all the words Bernick and Green devote to the importance of oaths, it is surprising that their work ignores or downplays the full content of the oaths actually taken by judges. Notice another salient indexical in the oath codified by the Judiciary Act of 1789, an indexical that affects the oath’s content: the word “my” in “to the best of my abilities and understanding.”<sup>76</sup> For one thing, it undermines an essential premise of their argument, which is that the content of the oath is wholly objectively accessible.<sup>77</sup> Their argument, it seems, illicitly shifts from the objectivity of the language of the oath to the objectivity of its content. But this is a mistake. Even though the *language* used in the oath is objectively and publicly accessible, that objective language itself denotes *subjective* content. That is, the full *content* of the oath itself calls for subjective assessment concerning the “best” of the particular oath taker’s “abilities and understanding.”<sup>78</sup>

Although Bernick and Green ignore the subjective content contained in the oath that federal judges took for two hundred years, they should not underestimate its significance. This best-of-*my-abilities-and-understanding* proviso shows that a key premise of their argument is false because that premise holds that the entire content of the oath has always been wholly objectively accessible.<sup>79</sup> It has not been. Indeed, the oath’s content is wholly consistent with the possibility that a particular judge (i) accepts that the test of “the Constitution” is significant in constitutional practice but (ii) *denies* originalist ontology and judges in a nonoriginalist way, given that, pursuant to a *particular oath-taking judge’s abilities and understanding*, the Constitution’s meaning is *not* fixed in time. In short, the oath itself shows why a nonoriginalist may with a clear conscience take the oath. The oath is consistent with a judge’s commitment to nonoriginalism.

This invites an objection: Does allowing the oath to have subjective content allow officials to hold “mental reservations” while secretly promising

<sup>75</sup> See Green, *Constitutional Indexicals*, *supra* note 1, at 1607.

<sup>76</sup> Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (emphasis added) (codified as amended at 28 U.S.C. § 453 (2018)); see also David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics and Epistemology of Demonstratives and Other Indexicals*, in THEMES ON KAPLAN 481, 489 (Joseph Almog et al. eds., 1989) (listing the most common demonstratives, including “my”).

<sup>77</sup> See Green, *Circular*, *supra* note 1 (stating so in Premise 3).

<sup>78</sup> Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (emphasis added) (codified as amended at 28 U.S.C. § 453 (2018)).

<sup>79</sup> Again, this false premise is found in Premise 3 of the schematic argument provided by Christopher Green. See Green, *Circular*, *supra* note 1.

to pursue their own private agendas?<sup>80</sup> And if so, does this suggest that the oath *cannot* be understood to have subjective content?

Hardly. Bernick and Green worry about officials crossing their fingers behind their backs while secretly pledging allegiance to private political causes in the guise of swearing to support “the Constitution.”<sup>81</sup> But objecting to secret oaths attacks a straw man. The alternative to oath-based originalism is not to permit *secret oaths*; the alternative is the perfectly banal observation that undertaking some legal obligations requires satisfying both objective and subjective standards, some of which are indexed to the particular person undertaking those obligations. As it happens, the oath’s content is itself partially subjective and underspecified, and thus, permits a broad range of constitutional understandings including nonoriginalist ones that judges have employed for centuries. We have other *institutional* mechanisms—like elections, selection processes, and confirmation hearings—that are designed to uncover secret agendas or idiosyncratic and deleterious views. But within the broad set of reasonable understandings of constitutional meaning, the oath hardly rules out nonoriginalist views.

However, there is a second possible objection. Recall that the Judicial Improvement Act of 1990 eliminated the best-of-my-abilities-and-understanding language from the 1789 version of the judicial oath. Does this help Bernick and Green? After all, they can now argue that the oath, as *presently* administered, lacks any subjective content since the offending indexical phrase—i.e., “my . . . understanding”—has been deleted.<sup>82</sup>

But this response introduces a dilemma. If Bernick and Green *agree* that the content of the 1990 oath differs from the 1789 version, then they concede that the political rhetoric is wrong because judges have *not* always taken the same oath as each other, let alone as with other officials. This casts doubt on the reliability of the political rhetoric as a source of evidence for the sameness claim. And this concession would be severely undermining because it breaks the link that they insist connects the founding generation with present-day judges. This concession would also open the door to Richard Re’s argument that judges take a binding commitment to uphold “the Constitution” as understood at the time the judge took the oath—or at least that the oath is indexed to public understandings of the Constitution’s content circa

<sup>80</sup> Bernick & Green, *supra* note 9, at 23–27.

<sup>81</sup> *See id.*

<sup>82</sup> The reasons for this deletion aren’t entirely clear. *See* Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 792 (1988) (“At the very least, the qualifying phrase ‘to the best of my abilities and understanding’ should be deleted. A judge who violates the oath should certainly not have a defense of weakness, of ability, or of mind.”). According to Richard Re, “Robert W. Kastenmeier was on the House Judiciary Committee, and this article was entered into the record on Pub L No 101-650.” Re, *supra* note 70, at 1166 n.87. *But see* Joyce Lee Malcolm, *Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment*, 13 CHARLESTON L. REV. 295, 310 (2018) (“Apparently the mention of the judge’s abilities and understanding was thought either not necessary or unnecessarily raising the possibility that the new judge’s abilities and understanding might leave something wanting.”).

1990.<sup>83</sup> The concession would be fatal, in short, because it defeats the claim that all judges take the same oath as the one taken during the founding, a claim on which their entire argument rests.

Green and Bernick have another option. They can double down on their claim that judges take the same oath, by insisting that notwithstanding the different linguistic formulations, the fundamental obligation undertaken by officials — to support the Constitution — remains the same. At this point, however, such a response would be dogmatic, unsupported by the evidence, and odd for avowed textualists, as it would simply ignore the language of the oath contained in the Judiciary Act of 1789. And even if we were to grant for the sake of argument that the judicial oaths remained unchanged after 1990, this would simply show that the subjective content of the 1789 oath survives to this day, albeit implicitly rather than explicitly. Judges would still be pledging allegiance to the Constitution subject to the proviso that they do so to the best of their abilities and understanding.<sup>84</sup>

To recap: So far we have established that, even if (a) is true, and the Constitution is a set of original meanings, nothing *about the oath* establishes (b)—that judges are bound or constrained by those meanings. Instead, they are bound to their best understandings of what the Constitution requires, which may be a nonoriginalist understanding. Alternatively, Bernick and Green would have to give up on their claim that judges have always taken the same oaths as each other and as officials in the founding generation. This likewise breaks the link that is supposed to show that officials are bound to uphold the Constitution's original understanding.

### C. *Further Reflections on Constitutional Indexicals*

But what about (a)? Have Green's arguments about Constitutional indexicals established that "this Constitution" refers to the original meanings of a Constitutional text? Although this paper aims mainly to refute the claim that constitutional oaths *require* judges to be originalists, Green's arguments purporting to establish that the Constitution *is* a set of original meanings remain doubtful.

Consider again the indexical phrase "this Constitution." According to Green, there are only seven plausible referents for "this Constitution": "(1) the original expected applications; (2) the original ultimate purposes; (3) the original textually-expressed meaning or Fregean sense (the alternative [he] favor[s]); (4) a collection of evolving common law concepts; (5) a text expressing meaning by today's linguistic conventions; (6) a collection of moral

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<sup>83</sup> See Re, *supra* note 26, at 304.

<sup>84</sup> Another possible position Green and Bernick might take is that the oath always remained the same, but that even with the "best of my abilities and understanding" proviso, the oath never imported a subjective understanding. But, we think this position is untenable because it contravenes the oath's plain language.

concepts refined through an evolving tradition of moral philosophy; and (7) a collection of non-binding recommendations.”<sup>85</sup>

But these possibilities don’t exhaust the possible theoretical space: Of course, there could be complex combinations of these enumerated seven. For one thing, it is possible that “this Constitution” simply refers ambiguously to two or more items on the list. Nothing Green writes appears to rule this out.<sup>86</sup>

More importantly, “this Constitution” may refer to a particular legal system. The kernel of that legal system is the text of the Constitution, with certain core values. Adding to the kernel there is a legal tradition, including the norms of argumentation, the way we engage in legal discourse, commitment to the rule of law, and so on. Indeed, something like this plausible understanding of “this Constitution” in Article VI roughly fits the views of David Strauss, Mitchell Berman, Richard Fallon, and other nonoriginalists.<sup>87</sup> And, ironically, this systemic understanding of the term’s referent may be closer to the actual understanding of members of the founding generation. “As Bernard Bailyn described it,” recounts Farah Peterson in her recent work, “what they meant by the term ‘constitution’ was ‘the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them.’”<sup>88</sup> This laundry list goes far beyond the written text’s meaning and includes *unwritten* principles and values. And it is not obvious that the meaning is static and fixed in quite the way presupposed by originalist scholarship today.<sup>89</sup> Indeed, “the Constitution” in the sense described by Peterson and many nonoriginalists is not fundamentally about linguistic *meaning* at all: it’s about what comprises or *constitutes* a particular set of institutions. And, as John Gardner points out, it is a category mistake to conflate what constitutes institutions with a constitutional text or its meanings.<sup>90</sup> So to rely on the constitutional text’s index-

<sup>85</sup> Green, *Constitutional Indexicals*, *supra* note 1, at 1607.

<sup>86</sup> Green might argue that such ambiguity should be disfavored and that a theory that avoids ambiguity is a much better one. We agree with this general proposition. But in making sense of what “the Constitution” references, context matters. Consider a term like “the Country”—in one speech by the President, it could refer to the citizenry, the land, or the foundational principles and ideals. Similarly, “the Constitution” could also refer to the text, the expected applications, the intentions of the drafters, or the broader legal system—all dependent on the context of how the term is used. So, while we may generally prefer to avoid interpreting the term in a text ambiguously, the context of the occurrences of the term may reveal the ambiguous interpretation to be the most sensible.

<sup>87</sup> See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 33–49 (2010); Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1376–90 (2018); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252–68 (1987).

<sup>88</sup> Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559, 567–68 (2020).

<sup>89</sup> See *id.*

<sup>90</sup> John Gardner, *Can There Be a Written Constitution?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162, 170 (Leslie Green & Brian Leiter eds., 2011) (“On closer inspection, it may seem, it is part of the nature of a constitution that it is unwritten, and that its so-called written parts are only parts of it because of their reception into the unwritten law that is made by the customs and decisions of the courts and other law-applying officials. If that much is

icals to definitively establish the referent of “this Constitution” is to rely on an overly blunt instrument.

Notice how this institutional, systemic, and dynamic understanding of “the Constitution” accords with the oath. Two judges, from different time frames, could plausibly say that they work in the “same” legal system. Both Justice John Paul Stevens and Justice Antonin Scalia would have sincerely said that they were judges working in the same legal system that Justice John Marshall, Justice Oliver Wendell Holmes, Jr., and Justice Earl Warren had served. And they could say so, despite the fact that the text, interpretations, and applications of the Constitution were different. Moreover, they could say so even though their interpretive methodologies were substantially different. Consequently, under this understanding of “the Constitution,” they could also plausibly say they took the “same” oaths to the “same” Constitution. One of the judges could be a die-hard originalist while the other could be a committed living constitutionalist. And neither of them would be mistaken about the content of the oath so understood.

Is this concept of a constitutional system embedded in the list? Green may insist that Fregean “senses” embedded in the constitutional text add up to a legal system—but, again, that’s a category mistake: neither texts nor linguistic meanings, taken alone, count as a legal system.<sup>91</sup> We can draft up a Constitutional text of our choosing without thereby creating a legal system. Nor is it clear that some other combination of items on the list add up to a constitutional legal *system*. Suffice it to say that Green’s list is incomplete.

But let’s return to Green’s argument and show why it doesn’t exclude the possibility that “the Constitution” refers *at least* to a legal system. Green attempts to exclude (4)–(7) on the basis of indexicals like “this,” and “here.”<sup>92</sup> Among his examples, Green suggests that these indexicals show that the Constitution is reduced to its text.<sup>93</sup> For one representative example, Article I, Section 1 provides: “All legislative Powers *HEREIN* granted shall be vested in a Congress of the United States . . . .”<sup>94</sup> But this doesn’t do the work he thinks it does. Our proffered construction of “the Constitution” can recognize that part of the legal system is the text of the Constitution, in addition to other features of the legal system. Understood that way, there is no contradiction. Article I, Section 1 can acknowledge that the Constitution *INCLUDES* text, but that does not require that the Constitution is *ONLY* text.

In a similar vein, Green argues that a few temporal references, like “now” and “the time of the Adoption of the Constitution” fix the Constitution to the text of the Founding.<sup>95</sup> But this too doesn’t get very far. Our

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true, then ‘The Constitution of the United States of America’ is a serious misnomer, for inasmuch as it is a name given to a document containing canonical formulations of law, it involves a category mistake. Constitutions cannot be, or be contained in, documents.”)

<sup>91</sup> Cf. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 786–88 (2017) (demonstrating that a legal text is not identical to either its meaning or law).

<sup>92</sup> See Green, *Constitutional Indexicals*, *supra* note 1, at 1649–53.

<sup>93</sup> See *id.* at 1649.

<sup>94</sup> *Id.* at 1652 (quoting U.S. CONST. art. I, § 1) (emphasis omitted).

<sup>95</sup> *Id.* at 1662–66.

construction of “this Constitution” can recognize that it was adopted at a certain point in time—but the “it” that was adopted was the text as well other features of a legal system, all together.

In short, Green’s case that these textual references in the Constitution require originalism is inconclusive. Moreover, importantly, none of these references actually come from the oath—they come from the Constitution’s text. Even if these arguments won the day for Green’s favored brand of textualism, they would be separate and apart from the oath.

Now, what about Green and Bernick’s observation that various officials all purport to swear the *same* oath as, say, George Washington? This seems to load the dice in favor of their idea that, whatever the Constitution *is*, it is the same thing that George Washington swore to uphold. Recall that from these official statements, Green and Bernick conclude that, because the declarants knew that the words of the oaths were sometimes distinct, they must not have meant identity of text when they said they took the “same” oath—they must have meant identity of referent. But this unanimity might be an illusion. Indeed, remarks in the prior paragraph are important to revisit here. Alternative understandings of the referent of “this Constitution” or “the Constitution” help to explain why so many officials, from all walks of life and given all sorts of political priors, so readily and breezily claim that they all take “the same” oath to uphold “the Constitution”: this claim simply reflects incompletely theorized agreement or an agreement obtainable only because the oath’s language expresses content at a high level of generality, admitting multiple reasonable understandings of the proper referent of “the Constitution.”<sup>96</sup> Oath-taking officials might be thinking about a particular Constitutional *text*. Or its original meaning. Or of a particular Constitutional *political order*. Or maybe officials understood “same” to mean near-identity—whether referring to text of oath, concept of Constitution, or attitude toward Constitution.<sup>97</sup> But if we were to pressure the oath takers as to what the oath refers to *specifically*, familiar disputes about originalism versus nonoriginalism would quickly re-emerge.

Green and Bernick may disagree with all this—they may contend that a legal system view—or any other of a number of candidate referents—reflect implausible understandings of “this Constitution.” That’s a costly claim, in

<sup>96</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1733 (1995).

<sup>97</sup> If there is no consensus on what the oath means to a certain specificity, then per the Hartian view of the law, there is no legal obligation that the oath confers to that degree of specificity. That is not changed if judges mistakenly believe that others view the oath as they do—because despite the mistakes, there would actually be no consensus. This is not much of a bitter pill, because we don’t have the intuition that the oath confers very particular legal obligations. However, we also don’t think the oath is contentless: It likely does confer an obligation to reject and oppose, say, fascism and autocracy. But, if so, that’s because there is consensus on that point, at least on the Hartian view: Whatever you reasonably think of the Constitution, fascism and autocracy aren’t part of it.

We don’t seek to tie Green and Bernick to a particular theory of law. Rather, we pick the Hartian theory because of its prominence, to show that varied views of the oath are unproblematic for purposes of the law’s smooth operation.

the way we saw before: that response would reveal that the oath performs no independent analytical work in supporting originalism. And again, their claim is not really one about the oath; it's a separate claim about the nature of the Constitution that doesn't depend on the constitutional oath.<sup>98</sup>

Green and Bernick may also respond affirmatively—that such an understanding of the Constitution just is originalism, properly understood. For this, they may look to the “original-law originalism” of William Baude and Stephen Sachs.<sup>99</sup> Here we observe that there are strong reasons to doubt that such an originalism is meaningfully distinct from other theories of interpretation.<sup>100</sup> As a consequence, the oath does not entail any DISTINCTIVE ontological originalist claims. For example, if the “originalist” ontology that Green and Bernick have in mind is that the law of the United States is the law of the founding put through a process of evolution, by legal processes that have themselves evolved, all the way to the present, that might be true—but it would not be DISTINCTIVELY originalist because many mainstream nonoriginalist theories contend the same.

In sum, Green and Bernick's arguments that the oath requires a commitment to Ontological Originalism fails for the following reasons. First, *either* the judicial oath taken by federal judges contains subjective content that appeals to a judge's conscience (and in turn, is consistent with nonoriginalism) *or* central premises in Green's and Bernick's argument are false (i.e., the premise that officials take the same oath or that we can take at face value officials' claims to that effect). Either way the oath itself provides no independent support for claim (b) of Ontological Originalism: that the Constitutional text's original meaning constrains judges. Second, we offered rea-

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<sup>98</sup> Adrian Vermeule makes a similar point that the oath argument is question-begging and superfluous. See Vermeule, *supra* note 5 (“[T]he argument from oath-keeping begs the question; it is necessarily parasitic on some independent account of constitutional interpretation, an account whose validity is itself the contested issue. The current debate isn't over the question whether to respect the oath of constitutional fidelity, rightly understood; all concerned agree on that aim. Rather the whole debate is over what the Constitution is best taken to say, and how to decide what it says.”)

Green responds to this point with a seven-premise argument, including “(5) A constitution with different powers to change is a different constitution” and “(7) At the Founding, the text of the Constitution imposed its requirements by expressing meaning on the basis of the legal interpretive conventions that existed at the time, applied to the original context.” Green, *Circular*, *supra* note 1. We do not explore this at length here, but suffice it to say that these premises are underspecified in present form. This in turn seems to prove Vermeule's point: They either entail originalism, in which case the oath is again beside the point; or they don't, because other nonoriginalist competitor theories would agree with the specified premises, and the oath does not advance the argument.

<sup>99</sup> See Baude, *supra* note 1, at 2349; William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 812 (2019); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 817 (2015).

<sup>100</sup> See, e.g., SEGALL, *supra* note 41, at 106 (criticizing “inclusive originalism” as “indistinguishable” from “living constitutionalism”); Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1330 (2017); Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 2020 B.Y.U. L. REV. (forthcoming 2021) (manuscript at 6–8) (on file with authors); Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 44 (2016).

sons to doubt Christopher Green's arguments in support of claim (a) of Ontological Originalism. We pointed out that the purportedly objective referent of "this Constitution" can take many forms, including a constitutional *system* of government, that understanding how to best support that system can be similarly capacious, and that Green has not adequately ruled out other plausible referents of the term. Of course, these may be controversial views about our Constitution, but resolving them requires going beyond the oath and into the very substance of debates about the Constitution that we have been engaged in for generations.

#### CONCLUSION

We have shown that the oath argument does not entail that judges must be committed to originalism, either in a practically significant way (what we called Fearless Originalism) or as a distinctive thesis about what the Constitution really is (as Ontological Originalism). Some form of originalism may be true. But determining whether it is so requires looking beyond the oath to the underlying questions constitutional scholars have been considering for generations. The oath argument simply does not make progress on those questions.

We might wonder whether the oath tells us *anything* about the constitution. At least one of the present authors doubts that the oath adds any significant moral obligations beyond those incurred upon taking the job of a Judge or Justice. Regardless, and at best, the oath might tell us something very weak, something about which everyone already agrees: that by swearing an oath a new judge conveys the seriousness which he or she undertakes the role of an adjudicator within a constitutional order, and that such a judge promises to discharge her duties in good faith. But you don't need to be an originalist to believe *that*.